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Extraordinary Writ of Prohibition in Missouri, The (continued)

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THE EXTRAORDINARY WRIT OF PROHIBITION IN MISSOURI

(Continued)

5.

(The Writ Issues to Stop the Exercise of Jurisdiction Not Possessed.)

(a) *No Jurisdiction Because There Has Been No Service of Process.*

There are a number of cases, when there was no dispute as to the facts, where the writ has been issued to stop a court from proceeding as to a party that had never been served with process, or, could not be legally served.[80] The law seems to be clear that if such is the situation the writ should issue. In one case a circuit court attempted to order a corporation, that had never been served, and in fact was not a party to the suit, to turn over all its assets to a receiver the court had appointed. The circuit court was stopped from carrying out the order by prohibition.[81] And so a circuit court was stopped from proceeding further in an action on a foreign judgment when the foreign judgment showed no service upon the alleged judgment debtor.[82] The same result was reached when the probate court attempted to sell land to pay debts of a decedent without giving any notice to the heirs as is required by law.[83] So also a probate court was stopped by prohibition from passing on a claim against a decedent's estate prior to the return term.[84] The writ will issue to a probate court that attempts to proceed in any insanity proceeding where the service of the notice is void because served by the complainant in the proceeding.[85]

80. *Houston etc. Ry. Co. v. Caldwell* (1910) 231 Mo. 505, 132 S. W. 1067.

81. *St. Louis etc. Ry. Co. v. Wear* (1896) 135 Mo. 230, 36 S. W. 357, 658.

82. *State ex rel. Bond v. Fisher* (1910) 230 Mo. 325, 130 S. W. 35. The issuance of the writ in this case was not based solely on this ground.

83. *State ex rel. Deems v. Holtcamp* (1912) 245 Mo. 655, 151 S. W. 153.

84. *State ex rel. Harrington v. Pratt* (1914) 183 Mo. App. 209, 170 S. W. 418.

85. *State ex rel. Finch v. Duncan* (1916) 195 Mo. App. 541, 193 S. W. 950. Trimble, J., writing the opinion, said: "If the so-called notice on which the inquiry is based is in law no notice, then the error of considering it as notice is not only an error of law, but one going to the jurisdiction of the probate court to maintain the inquiry and not a mere irregularity, or defect thereof. In such case prohibition will lie." See also *Burke v. McClure* (1922) 211 Mo. App. 446, 245 S. W. 62.

(b) *The Writ Issues Where There Is No Jurisdiction of The Subject of The Action.*

As was stated at the outset of this part of the article, a court in order to exercise its powers must have jurisdiction of the subject of the action. If the subject of the action is beyond the jurisdiction of the particular court it will be stopped from proceeding further by a writ of prohibition. The writ was issued stopping a circuit court from trying a suit in equity to cancel an alleged fraudulent deed to lands in Virginia, the court being of the opinion, (except Lamm, J., and Kennish, J.) that, though the necessary parties were before the court, a Missouri equity court had no power to render a decree affecting title to land in another state.[85a] Hence, it has been decided that a circuit court will be prevented by prohibition from trying an equity case to restrain a railroad company from building an embankment on an abandoned street, conceded to be in a county outside the jurisdiction of the court, where the statute limited the jurisdiction of the court, even in an equity case, where title may be affected, to land within the area composing the circuit.[86]

So also a circuit court will be stopped by prohibition, when sitting as a juvenile court, from making orders relating to the custody of children living in a county not within the circuit.[87] The statute conferring the power over children, proposed to be exercised, limited it to children either residing in or being in the county where the court sits.[88]

A circuit court will be stopped that attempts, in an equity case, through its receiver, to take possession of a fund of a foreign insurance corporation when the fund is in another state.[89] Hence, the writ has been issued to a probate court about to appoint a guardian for a person of

85a. *State ex rel. Hunt v. Grimm* (1912) 243 Mo. 667, 148 S. W. 868.

86. *State ex rel. Gavin v. Muench* (1910) 225 Mo. 210, 124 S. W. 1124.

87. *State ex rel. Emory v. Porterfield* (1922) 211 Mo. App. 499, 244 S. W. 966. Trimble, J., for the court, said: "But the facts are not contested, and hence lack of jurisdiction appears on the face of the proceedings in the juvenile court. It is well settled that the attempted action of a court in excess of or beyond its jurisdiction may be prohibited. *St. Louis etc. Ry. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341."

88. R. S. Mo. 1919, §2592.

89. *State ex rel. Minnesota etc. Co. v. Denton* (1910) 229 Mo. 187, 129 S. W. 709. See also *State ex rel. Hartford etc. Co. v. Shain* (1912) 245 Mo. 78, 149 S. W. 479. When a circuit court was stopped from trying an equity case to compel an accounting against a foreign corporation when its funds, books, etc., were in another state.

advanced age,[89a] where the statute only conferred power to appoint a guardian for an idiot, lunatic, or person of unsound mind; also where the probate court was about to appoint a guardian for one who was not the owner of property,[89b] where the court only had such power over persons of unsound mind owning property.

(c) *The Wrong Venue.*

The writ will issue when a suit is pending in a court other than the court which a statute has provided is the proper place to bring the suit. The circuit court of Ray County was prohibited from entertaining jurisdiction of a proceeding to extend a drainage district when the statute provided such an action should be commenced in the county where the district was incorporated and its articles of incorporation were filed.[90]

(d) *Where The Judge of The Court is Disqualified.*

Prohibition issues where the judge of the court, for some legal reason, is disqualified from sitting in the pending case, and, though disqualified, continues to act as judge of the court. The leading case in this state to this effect is *State ex rel. Renfro v. Wear.*[91] Respondent Wear, a circuit judge, by an order of court had disqualified himself from sitting as judge

89a. *Burke v. McClure* (1922) 245 S. W. 62, 211 Mo. App. 446.

89b. *Carter v. Bolster* (1906) 122 Mo. App. 135, 98 S. W. 105.

90. *State ex rel. Norborne Land Co. v. Hughes* (1922) 240 S. W. 802, 294 Mo. 1. Elder, J., writing the opinion, said: l. c. 805. "The real question before us is one of venue. If the circuit court of Ray County lacks jurisdiction, or is assuming authority in excess of its jurisdiction, prohibition will lie."

91. (1895) 129 Mo. 619, 31 S. W. 608. Judge Gantt, delivering the opinion, said: "When the request was made by Judge Wear as authorized by the constitution and statute, and that request unquestionably included the cause of the State of Missouri against Charles E. Wear, and was acceded to by Judge Riley, by appearing at the time and place mentioned in the request, and formally accepting the call, all the facts concurred which invested the latter with the powers and duties of the circuit judgeship of that circuit for the trial of the cause of the State of Missouri against Charles E. Wear. Ex parte Clay, 98 Mo. 578; State v. Higgerson, 110 Mo. 213; State v. Neiderer, 94 Mo. 79. And from that moment Judge Wear, *pro hac vice*, became functus officio, and had no authority or right to interfere with, or impede, the due administration of justice in that court, in that cause."

in a prosecution against his son for murder. He called in Judge Riley, judge of a nearby circuit. Judge Riley appeared at the appointed time but Judge Wear declined to give up the bench to him but adjourned to a later day at which time a special judge was elected. The prosecuting attorney then petitioned the Supreme Court for a writ of prohibition.

It was held by the court *en banc*, Judge Gantt writing the opinion, that a writ of prohibition should issue forbidding Judge Wear and G. A. Standard from acting as judge and special judge, respectively. It was held that the constitution provided that if the regular judge should be disqualified the court might be held by the judge of any circuit in that state. It was pointed out that the legislature by statute had provided that near kinship to a defendant in a criminal prosecution disqualified a circuit judge. The original order calling in Judge Riley was held to be valid and proper and when he appeared Judge Wear had no jurisdiction in the case.

The principle of this case has been applied to other cases when for some legal reason the circuit judge has not been qualified to sit in the pending case. [92]

92. *State ex rel. Lentz v. Fort* (1903) 178 Mo. 518, 77 S. W. 741; *State ex rel. Judah v. Fort* (1908) 210 Mo. 512, 109 S. W. 737; *State ex rel. McAlister v. Slate* (1919) 278 Mo. 570, 214 S. W. 85. In the last case Faris, J., writing the opinion, said: "Upon the question whether prohibition is the proper remedy, the case of State ex rel. v. Wear, 129 Mo. 619, is upon principle conclusive. This is so apparent as scarcely to require exposition. The ultimate facts in the Wear case were that Judge Wear, being concededly related to the defendant, and therefore biased and prejudiced as the legislature had determined, by the very fact that it passed the statute disqualifying him and others similarly situated, yet persisted in sitting the trial of the case, or in preventing another judge from taking jurisdiction therein. If the fact of the bias of Judge Wear had not been foreclosed by the legislative determination of the fact of prejudice from the fact of relationship, but had been left to be determined by evidence adduced, it is as plain as a pikestaff that the cases presented are precisely alike. Therefore, if the fact of respondent's prejudice and bias shall have been shown by the evidence in this case, he stands in a position in no wise different from that of Judge Wear, and so prohibition will lie.

"Therefore, if we shall find as a matter of fact from the evidence in the case that respondent is prejudiced, we bring the case as we look at it, precisely within the procedure successfully invoked in the Wear case. How stands the evidence upon this question of fact?"

See also *State ex rel. Kochtitzky v. Riley* (1907) 203 Mo. 175, 101 S. W. 567.

State ex rel. Brady v. Evans (1904) 184 Mo. 632, 83 S. W. 447, seems to be *contra*,

(e) *Where Jurisdiction of The Case Has Previously Been Assumed by Another Court in The Judicial System.*

It would seem to be true that if in our judicial system suit has been begun in a court with jurisdiction, and the jurisdiction of the court has attached, that a second court should be stopped from entertaining jurisdiction of that suit.

There are a number of cases where substantially that situation has been presented, and the rule seems established that the writ should issue to stop all action in the second court, that attempts to exercise judicial powers.[93] For instance in an equity case where the holders of certain

holding it is mere error for a judge not to vacate the bench. In that case Valliant, J., said l. c. 642: "If the application is in due form and in due time, his duty to grant the change in a certain class of cases, is imperative, but still it is for him, at least, to say that the application is or is not in due form or in due time, and although he may err in his judgment yet his jurisdiction is not thereby ended. And sometimes the application is complicated with other questions. Take this case for illustration: does the statute in relation to change of venue in ordinary civil suits apply to a contested election case? That that is a debatable question is shown in the briefs before us in which learned counsel on each side have debated it both on principle and on authority; the learned circuit judge himself took time to consider it and postponed his decision to a later day. If the application for a change of venue was a jurisdictional fact, the very filing of it ended the jurisdiction of the court, regardless of the opinion the judge may have had of the law questions involved, and all the duty that remained to him was to designate another court or judge to try the case."

See *State ex rel. Bixman v. Denton* (1908) 128 Mo. App. 304, 107 S. W. 446. There a court of appeals decided that a circuit judge was not qualified, and, that the party—one who had been granted a dramshop license by the county court—was entitled to have another judge called in to try the case. The court, though, denied his petition for a writ of prohibition but very oddly, it seems, ordered the circuit judge to call in another judge.

93. *Roper v. Cody* (1877) 4 Mo. App. 592; *State ex rel. Missouri etc. Lumber Co. v. Dearing* (1904) 180 Mo. 53, 79 S. W. 454; *State ex rel. Sullivan v. Reynolds* (1908) 209 Mo. 161, 107 S. W. 487; *State ex rel. Missouri Pacific Ry. Co. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740; *State ex rel. Bowling Green Trust Co. v. Barnett* (1912) 245 Mo. 99, 149 S. W. 311; *State ex rel. Federal Lead Company v. Dearing* (1912) 244 Mo. 25, 148 S. W. 618; *State ex rel. Igenbohs v. Landis* (1913) 173 Mo. App. 198, 158 S. W. 883; *State ex rel. Davis v. Ellison* (1919) 276 Mo. 642, 208 S. W. 439; *State ex rel. Mitchell v. Gideon* (1922) (Mo. App.) 237 S. W. 220.

State ex rel. Richardson v. Withrow (1897) 141 Mo. 69, 41 S. W. 980, where the writ was issued stopping a circuit court from proceeding with an assignment for the benefit of creditors where it was made by a surviving partner who at the time was

notes were enjoined from suing at law, and an appeal was taken, but the chancellor continued the injunction pending the appeal, a writ of prohibition was issued stopping another circuit court from proceeding in a suit on the notes.[94]

So, also, where a circuit court had appointed a receiver and the defendant appealed to the Supreme Court, a circuit court of another circuit was prevented by prohibition from proceeding with a suit to appoint a receiver for the same defendant.[95]

The rule has been applied to cases when a suit has been begun in the state court after jurisdiction of a Federal Court over the same case has already attached.[96]

acting as administrator of the partnership affairs under the jurisdiction of the probate court.

94. *State ex rel. Missouri Pine Lumber Co. v. Dearing* (1904) 180 Mo. 53, 79 S. W. 454. The opinion consists mainly of a consideration of the power of the court to continue the injunction pending the appeal. There is practically no discussion as to the propriety of prohibition.

95. *State ex rel. Sullivan v. Reynolds* (1908) 209 Mo. 161, 107 S. W. 487. Woodson, J., writing the opinion, said: "Whenever the jurisdiction of a court of competent authority takes jurisdiction of a case that fact must of necessity and in the very nature of things exclude the jurisdiction of all other courts over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. The reason for this rule seems to be that when such a court takes jurisdiction of a particular case, with all the incidents thereto, there remains nothing of it to which the jurisdiction of another court can attach—no case, no parties, no subject-matter is left exposed to the authority of the latter court."

"If the condition of things that exists in this matter is permitted or tolerated, there would be an inevitable conflict between the two courts and the officers of each in the service and execution of their respective orders and processes. This would not only interfere with the orderly and speedy administration of the law, but might lead to physical conflicts between those officers in their efforts to obey those orders and judgments. The result would lead to confusion, chaos and anarchy within the very temples of justice, and sanctioned by the highest tribunal of the State. Such a condition should not be tolerated."

96. *State ex rel. Federal Lead Co. v. Dearing* (1912) 244 Mo. 25, 148 S. W. 618; *State ex rel. Bowling Green Trust Co. v. Barnett* (1912) 245 Mo. 99, 149 S. W. 311; *State ex rel. Missouri Pac. Ry. Co. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740. The following extract from the separate concurring opinion of Lamm, J., in *State ex rel. Mo. Pac. Ry. Co. v. Williams, supra*, puts the question interestingly: "Is jurisdiction a mere matter of power or caprice? If the Federal court assume it in the first instance (as here) may the state court take it away directly if it has the might? Or

(f) *No Jurisdiction Because an Appeal Has Been Taken to a Higher Court.*

After an appeal has been taken a lower court loses jurisdiction of the cause.[97] There are several cases in Missouri holding that prohibition will lie to stop further action by the lower court after an appeal has properly been taken to a higher court.[98] In *State ex rel. Laclede Bank v. Lewis*,[99] the St. Louis Court of Appeals was about to issue a peremptory writ of mandamus to a judge of the circuit court ordering him to enter a judgment on a verdict that had been rendered in a case that had been tried in the circuit court. The circuit judge appealed from the order of the court of appeals to the Supreme Court, and gave a supersedeas bond.

Notwithstanding the appeal, and the bond, the court of appeals was about to issue a peremptory writ of mandamus. At this juncture the defendant in the original civil suit filed a petition for prohibition in the Supreme Court. The latter court issued the writ basing its decision upon the ground that after the appeal and bond the court of appeals no longer had jurisdiction; holding from that time on, jurisdiction of the cause was in the Supreme Court.[100] The writ was also issued when a

circumscribe it, baffle it or whittle it away by ingenious indirection? Or may two courts proceed on contrary theories at the selfsame time and grind a litigant between the upper and nether mill stones of jurisdiction? The one saying aye and the other nay and each speaking an imperative voice?

"In the old days on the border Rob Roy and his clan had a property notion based on power alone. Of them it was said that:

"The good old rule
Sufficeth them—the simple plan,
That they should take who have the power,
And they should keep who can."

"Such 'simple plan' has no place in jurisprudence when applied to jurisdiction. So, what a State court may not seize with power, directly, it may not take in a round-about way by 'inching' over on the edges, or getting the same result by indirection."

97. *Ladd, Patrick Co. v. Couzins* (1865) 35 Mo. 513; *Burgess v. O'Donoghue* (1886) 90 Mo. 299, 2 S. W. 303.

98. *State ex rel. Laclede Bank v. Lewis* (1882) 76 Mo. 370; *State ex rel. St. Louis etc. Ry. Co. v. Hirzel* (1897) 137 Mo. 435, 38 S. W. 961; *Cuendet v. Henderson* (1902) 166 Mo. 657, 66 S. W. 1079; *State ex rel. United Rys. Corp. v. Wiethaupt* (1911) 238 Mo. 155, 142 S. W. 323.

99. (1882) 76 Mo. 370.

100. Ray, J., writing the opinion, said: "It may be remarked in the first place, that in this proceeding no question can arise as to the propriety of the ruling of the

circuit court had appointed a receiver, upon a creditor's bill, for a corporation, and the corporation gave bond and appealed to the Supreme Court from the order of the circuit court, declining to set aside the order appointing the receiver.[101] So, also, a probate court was stopped by prohibition from enforcing its order that an administrator turn over all the assets of a decedent's estate to an administrator *de bonis non*, where the administrator had appealed to the circuit court, and given bond, from an order of the probate court removing him.[102] The decision was based upon the ground that when the appeal was allowed, and the bond given, the probate court lost all jurisdiction.

(g) *No Jurisdiction Because the Term of Court Has Expired.*

Similar in principle to the cases just mentioned are cases where a final judgment has been rendered in a lower court and the term at which the judgment was rendered has expired. After the expiration of the term the court no longer has jurisdiction and hence may be stopped by prohibition from taking further action.[103] Hence the Supreme Court issued prohibition to stop a special judge of the circuit court from granting a new trial, and conducting the same, where there had been a criminal prosecution for murder and defendant had been convicted, and had filed a motion for a new trial, which had been overruled, and the term at which the motion was overruled had expired. The Supreme Court held

circuit court on the motion for a new trial; or that of the court of appeals in awarding said mandamus, as it is a fundamental principle that the writ of prohibition is never allowed to usurp the functions of an appeal, writ of error or certiorari. High on Extraordinary Legal Remedies, 771, 772.

"The only question now before us is the power of the court of appeals to order the mandamus, notwithstanding the appeal and approval of the bond in question. If the plain language of the statute is to control, it seems to us that the court of appeals, after the granting of said appeal, and the approval of said bond, had no further jurisdiction of the cause, and no power whatever to order the issuance of said writ."

101. *State ex rel. St. Louis etc. Ry. Co. v. Hirzel* (1897) 137 Mo. 435, 38 S. W. 961.

102. *Cuendet v. Henderson* (1902) 166 Mo. 657, 66 S. W. 1079.

103. *State ex rel. Brown v. Walls* (1892) 113 Mo. 230, 20 S. W. 1047; *State ex rel. Lentz v. Fort* (1903) 178 Mo. 518, 77 S. W. 741; *State ex rel. Bond v. Fisher* (1910) 230 Mo. 325, 130 S. W. 35; *State ex rel. Verble v. Haupt* (1914) 181 Mo. App. 18, 163 S. W. 532; *State ex rel. Gardiner v. Wurdeman* (1915) 192 Mo. App. 657, 179 S. W. 964; *State ex rel. Orr v. Latshaw* (1922) 291 Mo. 592, 237 S. W. 770.

that after the term expired at which the motion for a new trial was overruled the court no longer had jurisdiction over the case and was powerless to grant a new trial.[104]

(h) *No Jurisdiction in an Inferior Court Because the Case Has Already Been Finally Decided by a Supreme Court.*

There are several cases where the rule seems to be approved that if a cause has been finally decided by a superior court an inferior court will be stopped by writ of prohibition from proceeding contrary to the mandate of the higher court.[105]

(i) *Amnesty*

After an amnesty has been granted by the state a writ of prohibition will issue to prevent a lower court from trying persons who have received the benefits of the amnesty. A circuit judge was therefore stopped from trying some 1200 misdemeanor charges against a brewing company for violating a beer inspection law, when after the inspection law was passed the legislature passed an act granting a pardon to all persons who within a certain time paid a certain sum of money into the state treasury and the brewing company had paid the sum the state required.[107]

104. *State ex rel. Brown v. Walls* (1892) 113 Mo. 42, 20 S. W. 883. See also *State ex rel. Gardiner v. Wurdeman* (1915) 192 Mo. App. 657, 179 S. W. 964.

105. *Nolte v. Ferris* (1920) (Mo. App.) 226 S. W. 293; *State ex rel. Tune v. Falkenhainer* (1921) 288 Mo. 20, 231 S. W. 257.

106. *Nolte v. Ferris* (1920) (Mo. App.) 226 S. W. 293.

107. *State ex rel. v. Eby* (1902) 170 Mo. 497, 71 S. W. 52. Sherwood, J., writing the opinion, said: "The 'Beer Compromise Act' being an act of general amnesty, enacted by the Legislature in favor of the class to which relators belong, there was no manner of necessity for relators to plead it in bar of the prosecution in the lower court, since they could not have waived it if they would. And that act being a public law, the respondent judge was bound to take notice of it, and could not ignore it if he would.

"And yet, notwithstanding the contract made by relators with the state in pursuance of an express law enacted for the purpose; notwithstanding a solemn contract made, a consideration paid and accepted, and legislative amnesty granted, the respondent judge places himself on this record as intending to try relators on the very charges which the act, on compliance with its terms, says shall be barred. We do not hesitate to say that such intended course of conduct is indubitably beyond the jurisdiction of the trial court, and such fact is made apparent on the face of this proceeding."

(j) *An Unconstitutional Statute.*

In the case last considered, *State ex rel. v. Eby*,[108] a decision by the court, *en banc*, three of the judges out of the seven composing the Supreme Court were of the opinion that the beer inspection law was unconstitutional and hence, they concluded that as the law was void, because contrary to the constitution, the circuit court had no jurisdiction, and prohibition for this additional reason should issue to stop all further action in the circuit court. A court of appeals after the decisions of *State ex rel. v. Eby*, *supra*, was urged to hold prohibition would lie from circuit court to a police court to stop a prosecution in the latter under an ordinance relating to chimneys, which was claimed to be unreasonable and void. The court of appeals, however, declined to issue the writ taking the view that appeal was an adequate remedy.[109]

108. (1902) 170 Mo. 497, 71 S. W. 52. As to this Sherwood, J., said: "And it has been determined that if any given law is unconstitutional, this, of itself will afford ground for relief by prohibition. (Ex parte Roundtree, 51 Ala. 42; State ex rel. v. Young, 29 Minn. 474; 19 Am. and Eng. Encyc. of Law (1 ed.) 270, and cases cited.)

"Of course, if the law is unconstitutional which is made the basis of the proceedings, the case is one where it is obvious on the face of such proceedings that the trial court had no jurisdiction, and prohibition will consequently lie." A majority of the court in *State ex rel. v. Wood* (1900) 155 Mo. 425, 56 S. W. 474, decided prior to *State ex rel. v. Eby*, *supra*, were of the opinion that a court of equity did not acquire jurisdiction upon allegations in a petition, to restrain the collection of a personal tax, that the law imposing the tax was unconstitutional where no additional grounds for issuing the injunction were alleged. Prohibition was issued stopping the trial of the suit for an injunction. Gantt, C. J., l. c. 452, said: "The result of our examination is that the petition in the circuit court did not and in the very nature of the case could not, under the Act of May 4, 1899, allege facts which brought the case under any recognized head of equity jurisprudence. The case stands upon the naked averment that the law is unconstitutional and the inspection fee illegal, the remaining averments wholly failing to make a case under any decision of this court for injunctive relief."

109. *State ex rel. v. Shannon* (1908) 130 Mo. App. 90, 108 S. W. 1097. Goode, J., writing the opinion, said: "It is true that in exceptional instances the writ will issue to prevent a court from proceeding with a cause of action, criminal or civil, arising under an unconstitutional statute or a void city ordinance. In State ex rel. v. Eby, 170 Mo. 479, 71 S. W. 52, the Supreme Court prohibited a circuit court from proceeding with a cause founded on an unconstitutional statute. But this was done to prevent a multiplicity of suits which would have been instituted and maintained on the void statute if prohibition had not been granted, an exceptional fact. So, it seems, injunction will lie to prevent numerous prosecutions under a void municipal

(k) *Equity Suits. Injunctions.*

The reports contain many instances where prohibition has been sought to stop a circuit court, which has general equity powers,[110] from proceeding further in the pending case. Most of the cases where the writ has been applied for, are cases where plaintiff in the lower court is asking for an injunction or a receivership. The cases where an injunction is the remedy asked will be considered first. It cannot be said that entire harmony of statement, and perhaps decision, obtains in these cases, though it would seem that substantially the cases are harmonious and that a fairly well defined general rule may be deduced. Perhaps again at the outset of this branch of the subject, and before a generalization is made, it would be well to examine in some detail a few of the early cases on the question. The first case presenting this problem is *Thomas v. Mead, et al.*[111] already mentioned. Holmes, J., as stated, wrote the opin-

ordinance. (Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649). And there are authorities authorizing prohibition as well in such cases; or at least suggesting it will lie. (23 Am. & Eng. Cyc. Law (2 ed.) 230). Those decisions given in the footnote in the work just cited, which discussed prohibition as a remedy against prosecutions under an invalid municipal ordinance, while they did not deny the occasional expediency of the remedy, refused it in the instances dealt with, because there were more appropriate remedies by appeal or writ of error, for testing the validity of the ordinances."

110. *Vitt v. Owens, et al.* (1868) 42 Mo. 512; *State ex rel. Merriam v. Ross, Judge* (1894) 122 Mo. 435, 25 S. W. 947; *State ex rel. Hofmann v. Scarritt, Judge* (1895) 128 Mo. 331, 30 S. W. 1026; *Arnold v. Henry* (1900) 155 Mo. 48, 55 S. W. 1089; *State ex rel. McCaffery v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494; *State ex rel. Kenmore v. Wood* (1900) 155 Mo. 425, 56 S. W. 474; *State ex rel. American Lead etc. Co. v. Dearing, et al.* (1904) 184 Mo. 647, 84 S. W. 21; *State ex rel. Abel v. Gates* (1905) 190 Mo. 540, 89 S. W. 881; *State ex rel. Fenn, Relator, v. Riley, et al.* (1907) 127 Mo. App. 469, 105 S. W. 696; *State ex rel. Missouri Pacific Ry. Co. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740; *State ex rel. Minnesota etc. Co. v. Denton* (1910) 229 Mo. 187, 129 S. W. 709; *State ex rel. Bowling Green Trust Co. v. Barnett* (1912) 245 Mo. 99, 149 S. W. 311; *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713; *State ex rel. Warde v. McQuillin* (1914) 262 Mo. 256, 171 S. W. 72; *State ex rel. Elam v. Henson* (1919) 217 S. W. 17; *State ex rel. Allen v. Dawson* (1920) 224 S. W. 824; *State ex rel. Priest v. Calhoun* (1920) (Mo. App.) 226 S. W. 329; *State ex rel. Mills v. Calhoun* (1921) 234 S. W. 855; *State ex rel. Methudy v. Killoren* (1921) 229 S. W. 1097 (App.); *State ex rel. Youngman v. Calhoun* (1921) 231 S. W. 647; *State ex rel. Berncie v. Huck* (1922) 246 S. W. 303 (Mo.); *State ex rel. Burns v. Shain* (1923) 248 S. W. 591 (Mo.); *State ex rel. Chase v. Hall* (1923) 250 S. W. 64 (Mo.).

111. (1865) 36 Mo. 232.

ion. Holmes, J., wrote many of the early prohibition opinions for the court. His opinions are brief, clear, and display a sound knowledge of the scope and purpose of the writ.

It will be recalled that a circuit court in *Thomas v. Mead, supra*, was stopped by prohibition from proceeding further in an equity suit to restrain certain persons from taking possession of the books, records, etc. of the Supreme Court. The court soundly decided that though the circuit court had general equity powers it had no jurisdiction whatsoever to decide who was entitled to the records of the Supreme Court, especially since the pending case finally would turn on who were the *de jure* judges of the Supreme Court. Holmes, J., in the opinion, said: "There was not the shadow of an equity in the petition, properly considered, on which to ground an injunction at all. It is unnecessary to deny that, in certain cases, an injunction may be granted, mainly on the ground that an immediate and irreparable injury is threatened to be done, for which otherwise there would be no adequate and complete redress; and if a stranger, without right or authority, were unlawfully interfering with the rightful possession by the clerk of the records, books and papers of his office (especially if the court itself were not in session), it is very probable that such a case might arise as would give the circuit court jurisdiction to interpose by injunction against such person. But plainly on the face of this petition, this was no such case, but only a transparent pretence of such a case. It cannot justly be considered otherwise than as a sheer abuse of the process of injunction."

The extract quoted may be said to fairly indicate the rule as it has been stated and applied in many of the later equity cases. If the petition in the suit for an injunction states facts which show that a court of equity has no power to issue an injunction, prohibition will issue as that case does not belong to the class of cases of which the court has jurisdiction. The petition may be considered to determine whether plaintiff is entitled to equitable relief. If the facts as pleaded, and as they can be well pleaded, if they are defectively pleaded, show that plaintiff is not entitled to an injunction the court of equity will be stopped by the superior court by a writ of prohibition.

The next case of this nature that came before the Supreme Court is *Vitt v. Owens*,[112] decided in 1868. Again the opinion was written by Hol-

112. (1868) 42 Mo. 512.

mes, J. The facts in that case were as follows: The justices of the county court of Franklin County had taken action towards submitting to the voters the question of removing the county seat. In the meantime the court began certain repairs on the county court house. Certain citizens and taxpayers of the county brought a suit for an injunction, in the circuit court of Franklin County, to restrain the justices from making further repairs. A temporary injunction was granted. The justices then filed, in the Supreme Court, an application for a writ of prohibition to stop the circuit court from further action.

It was held a writ of prohibition should issue; that the matter of repairing the court house was exclusively for the county court and the circuit court had no power to interfere. Holmes, J., writing the opinion, said: "It is sufficient to say that here was no proper case even for this remedy, and much less for the remedy by injunction. Moreover, there was no equity in the petition on which an injunction could properly be granted. The facts stated made no case that would come under any head of equity jurisdiction for relief. The plaintiffs therein had no greater interest in the matter than any other taxpayers. No injury was done to them, no irreparable damage threatened, in respect of their property or private rights. It was simply a matter affecting the public interest and convenience, and one which the law had submitted to the judgment and discretion of the county court. Whether that discretion was properly exercised or not, the facts stated in the petition afforded no basis whatever for equitable relief in favor of the plaintiffs, by injunction or otherwise, against the county court or any other parties defendant. In such case the granting of an injunction can only be regarded as a sheer usurpation, or an inadvertent assumption of judicial power not conferred by any law; and the proceeding must be treated here, and for all the purposes of this application, as a nullity. It was not merely a transgression of the bounds of the proper jurisdiction of the court, or judge, but an exercise of judicial authority where no jurisdiction existed; and there can be no question but that we are fully warranted by the authorities in granting a prohibition. (Thomas v. Mead, 36 Mo. 232)"

Those decisions are followed by many cases on the subject. The problem has not always been easily solved and the distinction not always easy to make between cases where the bill in equity states no ground for equitable relief by injunction, and could not be amended to state proper

grounds, and cases where equity has power to issue an injunction, in cases of the same general type, as stated in the pending petition, but the petition is a defective statement of the case, one that could be amended so as to state a good cause for equitable relief. In cases of the latter type prohibition will not issue. A good example of cases of the latter type is *State ex rel. Abel v. Gates*,[113] decided in 1905, Valliant, J., writing the opinion. There a suit in equity was commenced in a circuit court to restrain members of the city council, and certain private individuals, from passing an ordinance relating to the privilege of using the streets for gas mains, selling gas, etc. It was contended by relator, who petitioned the Supreme Court for a writ of prohibition, that the petition did not state a cause of action. The Supreme Court declined to issue the writ saying that a court of equity had power to restrain members of the city council from passing an ordinance relating to such administrative matters, when the proposed ordinance involved a corrupt bargain, or had the effect of relinquishing valuable contract rights previously obtained by the city for its inhabitants, and, that the writ would not be granted where the petition merely defectively stated a cause of action. Valliant, J., for the court said: "So, here, if the statements of fact are not sufficient to constitute fraud, the trial court will so decide, and there will be time enough for us to express our opinion on that question when it comes before us on appeal. If the case stated, or attempted to be stated, in the petition, is of a subject over which the circuit court has no jurisdiction, yet the court gives indication of a purpose to entertain it, an application for a writ of prohibition would be received, but if it be that the petition merely states defectively a cause of the nature of which the court has jurisdiction, a writ of prohibition will not issue merely because it is feared that the court might erroneously decide that it was sufficient. We do not mean to imply from what is here said that the statements aiming to charge fraud in this petition are not sufficient or that they are of the same character as those in the Nagel case; we have no opinion on that subject, because the time for us to form an opinion has not arrived."

Those three cases, it is believed, bring out the rules that guide the courts in determining whether to issue or not to issue the writ. If from the petition it is evident no cause of action is, or can be, stated justifying

113. (1905) 190 Mo. 540, 89 S. W. 881.

an injunction, and the court is about to issue one, the writ of prohibition will issue. If from the petition it appears that the matter has been defectively, or not fully, stated and the petition may be so amended as to state grounds for relief by injunction the writ of prohibition will not issue.

The following are instances where it was decided that the petition did not state grounds for injunction relief, and could not be amended so as to state proper grounds, and hence a writ of prohibition should be issued. A circuit court was stopped by writ of prohibition from proceeding further in an equity suit to restrain certain persons from taking possession of property of a city used in connection with elections. It was alleged the election law under which defendants were acting was unconstitutional.[114] The decision was put upon the grounds that the purpose of the bill was either to try title to office, a matter over which a court of equity had no jurisdicition, or, perhaps, to protect the political right of the voters, another matter over which the court of equity had no jurisdiction. There are several later cases also holding that prohibition will issue to stop a circuit court from entertaining jurisdiction of a bill in equity when the purpose of the bill is to try title to office or protect political rights.[115]

114. *State ex rel. McCaffery v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494. Valliant, J., said: "The real and only purpose of the suit in the circuit court was to bar the entrance to the office of board of election commissioners by injunction, and to obtain a decree of a chancery court declaring relators' title to the office invalid. That is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons who have rights of that nature which have been violated, and ample means are afforded in those courts for the vindication of such rights and redress of their wrongs. (High on Inj., sec. 312; In re Sawyer, 124 U. S. 200; Hunter v. Chandler, 45 Mo. 452; State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. May, 106 Mo. 488)."

"There is no disguise of purpose in that statement; the powers of the chancery court are there plainly invoked to protect by injunction purely political rights. No such jurisdiction has ever been conceded to a chancery court, either in the Federal or State judiciary. The political rights of a citizen are as sacred as are his rights to personal liberty and property, but he must go into a court of law for them." Accord, *State ex rel. McCaffery v. Eggers* (1899) 152 Mo. 485, 54 S. W. 498.

115. *Arnold v. Henry* (1900) 155 Mo. 48, 55 S. W. 1089, in accord. Here Gantt, C. J., said: "In a word it is an attempt by a proceeding in equity to try the title to a political office, and we hold that equity has no such jurisdiction; that the courts of law furnish ample remedies for such a purpose, and we must decline in this proceeding to determine the validity of Washburn's title to the position." *State ex rel. Allen v.*

The writ was issued stopping a circuit court from trying a suit in equity, the purpose of which was to have the court declare certain priorities for railroad stocks and bonds, and to declare a certain mortgage a junior lien. It was decided the petition did not state a cause of action and could not be the basis of a decree as the property was beyond the jurisdiction and several of the essential parties not within the court's jurisdiction.[116] The writ was issued to prevent a circuit court from proceeding further with a bill in equity instituted by the circuit attorney of St. Louis to restrain the railroads of Missouri from charging more than the statutory rates for carrying passengers in the state. There were several grounds for the decision, one of which was the circuit attorney of St. Louis, in his official capacity, could not institute a suit for the people of the state and hence the petition showed on its face no basis for the exercise of the equity jurisdiction of the circuit court.[117] The writ was issued stopping a circuit court from proceeding further in a suit in equity to restrain the Beer Inspector from inspecting beer and instituting

Dawson (1920) (Mo.) 224 S. W. 824, where Williams, J., said: "The facts alleged, or attempted to be alleged, in the petition in the injunction suit, disclose the violation of no right other than a purely political one, and, since no facts are alleged which invoke any of the different grounds of equity jurisdiction, it clearly follows under the numerous authorities above cited that the circuit court in the case at bar is without jurisdiction to grant injunctive relief prayed."

116. *State ex rel. Bowling Green Trust Co. v. Barnett* (1912) 245 Mo. 99, 149 S. W. 311. Graves, J., writing the opinion, said: "The question then is, what is the character of this suit? Conceding it to be an action to cancel certain debenture bonds held in New York under a trust agreement to be performed in New York, as I think we must, then what? To my mind it is clear our circuit courts are without jurisdiction. The property is not here, neither are the principal parties in interest within the jurisdiction of the court. Can a Missouri circuit court decree the cancellation of bonds held in New York which bonds are held by a trust agreement to be performed in New York? We think not. Can such court cancel these bonds when upon the face of the petition many parties interested therein are not before the court even by publication or substituted service? We think not. If the property were here the question would be different. But the property sought to be reached is in New York and the most of the parties interested are there, or at least not in Missouri. In such case service by publication or other substituted service will not avail. The property not being here no jurisdiction of the person can be obtained by service of this character."

117. *State ex rel. Mo. Pac. Ry. Co. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740.

criminal prosecutions, when it was alleged the beer inspection law was void because contrary to the constitution. It was held courts of equity had no power to enjoin criminal prosecutions provided for in the inspection law, and that the inspection, though void, if carried out would not deprive those making beer of their property without due process of law.[118] Prohibition, however, was denied, to stop a circuit court from entertaining jurisdiction of a bill in equity brought by certain commission merchants to restrain certain officials from prosecuting under an act known as the state marketing bureau act, where it was alleged the act was unconstitutional, that property rights were involved, that enforcement of the law would destroy business, injure and destroy property, etc.[119] The court distinguished *State ex rel. v. Wood, supra*, saying it was not shown in that case that irreparable injury to property or business would result from an enforcement of the beer inspection law.

118. *State ex rel. Kenamore v. Wood* (1900) 155 Mo. 425, 56 S. W. 474. Gantt, C. J., writing the opinion, said: l. c. 453-4. "Having examined the various allegations of the bill for injunction in our opinion it did not state a case which fell within the class of which the circuit court had jurisdiction to grant an injunction, for the reason that the alleged unconstitutionality of the law alone furnishes no ground for injunction; and because the circuit court had no jurisdiction to prevent the institution of criminal proceedings by the inspector by information to punish violations of said act, and because in our opinion the bill, otherwise, charges no traversable facts showing a want of an adequate remedy at law, but on the contrary shows that the courts of law are open to the plaintiffs in said case to make their defense to any prosecution under said act, and that the act of May 4, 1899, does not require an inspector to open sealed packages of beer after they are closed to inspect the same, but may inspect said beer or malt liquors before put in the closed barrels or bottles.

"For these reasons we think the provisional rule of prohibition should be made absolute against Judge Wood and the circuit court over which he presides, but as Judge Ferris took no part in the case it is ordered dismissed as to him."

119. *State ex rel. Chase v. Hall* (1923) (Mo.) 250 S. W. 64. David E. Blair, writing the opinion, said: "In this case, as in the Merchants' Exchange Case, the plaintiffs allege in their petition (and in this proceeding the facts well pleaded therein must be treated as true) that their businesses as commission merchants, built up by years of effort, will be ruined, either if they attempt to comply with the marketing bureau act and take the required license, or if they test the validity of the law by submitting to criminal prosecutions wherein numerous fines will be assessed and numerous appeals necessary. They will be ruined by the enforcement of the alleged unconstitutional law, whether they obey it or resist it in the ordinary course of standing trial and appealing from convictions. Their business is an entirely legal business and very important to the producers and consumers of farm products. Their established

A circuit court was also stopped from trying a suit in equity to restrain a litigant in a pending suit from taking depositions, on the ground that the petition in the suit, in which the depositions were to be taken, did not state a cause of action.[120] The decision was placed upon the ground that depositions could be taken, under the statute, though the petition did not state a cause of action. A circuit court was also stopped from proceeding further with a suit in equity to restrain a physician from treating persons living within a certain district, when the petition showed only a contract with another physician, not to establish

businesses represent property rights which will be seriously impaired if not altogether wrecked by the enforcement of the law before its validity can be determined in the ordinary course through convictions and appeals. As in the Merchants' Exchange case, plaintiffs' situation calls for relief which only the strong arm of the court of equity affords. If the law is valid, it can be determined in one action. If it is invalid, it should be speedily determined. The petition alleges that defendants threaten to enforce the penalties of said law and cause defendants to be repeatedly arrested and prosecuted. It must be assumed that relators intend to do so. Such course of action will require defendants to take appeals in all cases of conviction, resulting in great labor and expense in furnishing appeal bonds and in paying for bills of exceptions and in printing of abstracts and briefs and fees and expenses of counsel. Such prosecutions will tend to impair the confidence of their customers, and thus tend to destroy the business of such commission men."

See *Merchants Exchange v. Knott* (1908) 212 Mo. 616, 111 S. W. 565. Lamm, J., writing the opinion, said: "But the charge of irreparable injury is sufficient to sustain the jurisdiction of a court of equity. The objection made to the charging part of the bill in regard to irreparable injury, is, in substance, that the pleading is a mere bundle of conclusions, and that no traversable allegations are made upon which issue can be joined and upon which irreparable injury can be predicated, but we do not agree to that. Plaintiffs allege that their business (describing it) of grain weighing and certification, a valuable asset and property right in grain dealing, built up (they say) and nurtured for many years by them, is about to be struck down and ruined and their grain markets ruined in ways pointed out by the enforcement of an unconstitutional law. The thing threatened to be done directly pertains to property rights which the bill alleges plaintiffs have acquired. Certainly, it could not be contended that the business of grain dealing, grain weight and grain certification by grain dealers, warehousemen, and elevators is *per se* an illegal business. Conceding it is under the State's police power, yet that police power must be exercised through a valid law.. Now, an unconstitutional law is the same as no law at all; and, on demurrer, we must assume the allegations of the petition relating to irreparable injury in the way specified are true. This being so, we conclude the bill states a cause of action, and nothing said in State ex rel. v. Wood, supra, when rightly understood, militates against that conclusion."

120. *State ex rel. Methudy v. Killoren* (1921) (Mo. App.) 299 S. W. 1097.

an office within the district,[121] so the higher court thought. It seems doubtful whether the action of the lower court, in interpreting the contract, conceding the interpretation was erroneous, and granting an injunction, made a situation that deprived it of jurisdiction. It would seem that at most it was only an error in the exercise of jurisdiction not correctible by prohibition.

The rule seems settled that if the subject matter of the petition in the equity suit for an injunction is one ordinarily within the powers of a court of equity, though the petition may be demurrable, that prohibition will not be issued. Hence, the writ was denied to stop a circuit court from entertaining jurisdiction of a suit by trustees of a local lodge to restrain the supreme lodge and others from depriving plaintiffs of the use of their property, and from appropriating the funds, etc.[122] It was held the circuit court had jurisdiction over the subject matter of the action, and all the parties, and that the sufficiency of the petition would not be determined. Also, a petition for the writ was denied to stop a circuit court from entertaining further jurisdiction of a suit in equity to restrain

121. *State ex rel. Youngman v. Calhoun* (1921) (Mo. App.) 231 S. W. 647. Becker, J., writing the opinion, said: "In the light of this view it is clear that the decree entered below by the learned circuit judge, in so far as it restrains and enjoins Dr. Youngman, in his practice of medicine and surgery, from making calls within said prescribed district, or treating patients living within said district, or from treating former patients or residents of such district who might call at his office, even though it is established outside the said district, goes beyond the terms of said contract, and is therefore to that extent in excess of the jurisdiction of the said learned trial judge, respondent here."

122. *State ex rel. Warde v. McQuillin* (1914) 262 Mo. 256, 171 S. W. 72. Lamm, J., writing the opinion said: "As to that we say: The sufficiency of the petition was not challenged by demurrer below. The court, so far as we can see, made no ruling on its sufficiency. How it might rule in due course is hidden in the womb of the future, and is discoverable only by the event, barring the occult vision of a seer, which latter we utterly disavow as a judicial attribute. It has been held in some cases, on the facts present in those cases, that if the sufficiency of the petition has been challenged in the circuit court and ruled adversely to demurrant so that it was settled once for all that the trial court entertained an erroneous view in excess of its jurisdiction and was going to put it in force, the remedy by prohibition might be invoked. But, on such facts as we are now dealing with, there is a better doctrine applicable to this extraordinary remedy, one finding abundant place in our decisions, to the effect that the circuit court does not lose jurisdiction by mere error in ruling on a demurrer or otherwise when such error is correctible on appeal or writ of error."

defendant from selling liquor.[123] A temporary injunction had been granted which was quite broad in its terms and apparently restrained defendant from operating the store mentioned in the petition. Graves, Elder, Blair, (J. T.), JJ., dissented on the ground the temporary order was too broad, that a court of equity could not temporarily restrain the operation of the store mentioned in the petition, viz, a grocery store, according to the applicable statute[124] relating to temporary injunctions in this particular type of nuisance. Some time later another attempt to secure a writ of prohibition failed when the pending case was an injunction proceeding to restrain certain persons from using a building in which it was alleged liquor was illegally sold,[125] where it was claimed the petition for the injunction did not state a cause of action. So, also, it has been held the writ will be denied to prevent a circuit court from proceeding further in a suit in equity to restrain a multiplicity of suits at law on the ground that the petition in the equity case failed to state the cause of action.[126]

123. *State ex rel. v. Huck* (1922) (Mo.) 246 S. W. 303. Higbee, J., writing the majority opinion stated that "the petition for injunction does not locate or identify any alleged grocery store, or allege that violations of the liquor law are being committed at any grocery store, etc., located or identified. The sufficiency of the pleadings, and whether the order made is too broad, are questions which should, in the first instance, be addressed to the circuit court, and are matters for correction there upon proper application."

Graves, J., writing the dissenting opinion, used this language: "The point is that under the temporary order the use of the house for lawful purposes cannot be restrained. This temporary order, as appears by the excerpt in the majority opinion, shows that the defendant was restrained from running 'the pool room, dry bar or soft drink counter and store mentioned in said petition'. The store mentioned in the petition was a 'grocery store'. Then follows the injunction against the liquor business. This latter part of the order is good. No one denies that the lawmakers can and have made the manufacture and sale of liquors unlawful, and provide both civil and criminal proceedings to meet the situation. But here we have a part of the temporary restraining order covering things that all citizens have the legal right to do."

See also *State ex rel. Thrash v. Lamb* (1911) (Mo.) 141 S. W. 655.

124. Laws of 1921, p. 413 *et seq.* Section 6594 C.

125. *State ex rel. Burns v. Shain* (1923) (Mo.) 248 S. W. 591.

126. *State ex rel. Fenn. v. Riley* (1907) 127 Mo. App. 469, 105 S. W. 696. Goode, J., writing the opinion, said: "It is within the jurisdiction of equity, on a proper showing in the proper forum, to prevent by injunction a multiplicity of suits, and a court of equity could not properly be prohibited from hearing a cause which applied for injunctive relief against such a grievance. Nor would it be sufficient to authorize prohibition that there is no merit in the suit for injunction, or that the petition for

The writ was denied to stop a circuit court from proceeding further in an injunction suit begun by the attorney general to restrain a club from illegally registering bets on horse races under color of a license fraudulently obtained from the state.[126a] It was held the court of equity had jurisdiction to so protect the interest of the state in its grant of the licenses.

(l) *Equity Suits. Receiverships.*

A study of the cases where prohibition has been prayed to stop a court from proceeding further in an equity suit, when a receiver is asked for, will show that the rules stated and applied are in substance the same as in the injunction cases just considered. Perhaps the leading case on this branch of the subject is *State ex rel. Merriam v. Ross.*[127] In that case the writ was issued by the Supreme Court to a court of common pleas stopping further action in a receivership case. It was held that a petition for a receiver filed by a debtor corporation stated no grounds whatsoever

said writ is demurrable. Those would be matters for the attention of the court of first instance, subject to review by the court of last resort, and would not go to the jurisdiction of the subject matter of the cause."

In this case the writ was issued on the ground that the particular equity court had no jurisdiction as the statute required that a suit in equity to restrain the prosecution of suits at law must be brought in the county where the law suits are pending, and this equity suit was not so brought. As to this point, Goode, J., said: "It will be perceived that the temporary writ granted by the judge of the probate court in the injunction suit, enjoined the defendants from doing two things, namely, instituting more cases against Conran and prosecuting in any manner Fenn's slander suit in the circuit court of the City of St. Louis, until the final determination of Conran's case against Fenn in the Supreme Court. Now, to our minds, it is perfectly clear that in the second part of this order the Honorable Judge of the probate court, who in this instance wielded temporarily the authority of a circuit judge, acted in excess of the jurisdiction of the circuit court. The effect of the writ granted is to prevent the prosecution in any manner of a case pending in the circuit court of the City of St. Louis, an independent jurisdiction. Our statutes provide that proceedings for an injunction to stay a suit or judgment, shall be had in the county where the judgment was rendered or the suit is pending. (R. S. 1899, sec. 3631). This section of the statutes has been construed to mean that when the main relief prayed is an injunction to restrain the prosecution of a suit, the remedy must be sought in the jurisdiction where the action or suit to be enjoined is pending."

126a. *State ex rel. Delmar Jockey Club v. Zachritz* (1901) 166 Mo. 307, 65 S. W. 999.

127. (1894) 122 Mo. 435, 25 S. W. 947.

for the appointment of a receiver, and that the common pleas court should be prohibited from carrying out its order relating to the receivership. The following extract from the opinion of Brace, J., who delivered the opinion of the court *en banc*, indicates the basis of the court's decision.

"In other words, it is simply a petition by a debtor for the appointment of a receiver to manage and carry on its business, so that its creditors cannot enforce their legal rights in the courts of the country, and not a petition stating a cause of action either at law or in equity in which, as incident thereto, a receiver might be appointed. The filing of that petition no more instituted an actual controversy between contending suitors in court, than would the filing of a copy of the Lord's Prayer. It laid no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver, unless some ground for the exercise of that jurisdiction can be found other than an actual, pending controversy in the court which undertook its exercise."

Barclay, J., wrote a dissenting opinion, in which Gantt and Burgess, JJ., concurred. The dissenting opinion is placed upon the ground that the common pleas court had general equity powers and that the petition for the receivership did state a cause of action.

In the next case of this type that came before the Supreme Court, prohibition was denied as the court was of the opinion that the petition stated a cause of action, warranting the appointment of a receiver;[128] and, that as the parties were properly before the court no jurisdictional question was involved.

Later it was held the writ would issue to stop a circuit court from proceeding further in a suit for a receiver begun by an employee who was

128. *State ex rel. Hofmann v. Scarritt* (1895) 128 Mo. 331, 30 S. W. 1026. This case was decided by Division No. 1 of the Supreme Court, Barclay, J., writing the opinion. As to *State ex rel. v. Ross* (1894) 122 Mo. 435, 25 S. W. 947, *supra*, he said: "The relator has cited and relied upon some rulings in State ex rel. v. Ross (1894) 122 Mo. 435, 25 S. W. Rep. 947 to sustain his contention on this branch of the case. But some of us did not concur in that judgment, and the rest of our number consider that the facts shown in the present proceeding distinguish the latter from the case discussed and decided in the opinion referred to; so that we all agree that the decision in the Ross case does not support the relator's claim for the writ of prohibition now."

See also *State ex rel. American Bankers etc. Co. v. McQuillin* (1914) 260 Mo. 164, 168 S. W. 924.

neither a stockholder nor a creditor.[129] So, also, the writ was issued stopping a circuit court, in an equity case, from attempting to carry out its orders appointing a receiver for a foreign corporation where the court, through the receiver, attempted to control a guarantee fund of the foreign company, which fund was outside the state and the jurisdiction of the court.[130] A court of appeals, following the principles laid down by the Supreme Court, issued its writ of prohibition to a circuit court stopping all further action in a receivership suit where it was determined the petition for the receivership stated no cause of action in equity, and was not amendable.[131]

129. *State ex rel. American Lead Co. v. Dearing* (1904) 184 Mo. 647, 84 S. W. 21.

130. *State ex rel. Minnesota El. Co. v. Denton* (1910) 229 Mo. 187, 129 S. W. 709. Valliant, J., writing the opinion for the court *en banc* said: "In this case the plaintiff claims to hold three policies of $2000 each, not mature, nothing now due on them, yet he asks that to protect his interests a receiver be appointed to go to Minnesota and take possession of the $600,000 guarantee fund, to preserve it for the security of his claims and the like claims of all others who will join him in this suit. No such receiver would be or ought to be recognized at the home of the corporation.

"The circuit court has no jurisdiction of the cause of action stated in the petition of Herman P. Faris v. The Minnesota Mutual Life Insurance Company, and no amendment of the petition could give the court jurisdiction of that cause; an amendment stating a cause of action within such jursidiction would be an amendment stating a new or different cause of action; the demurrer should therefore have been sustained and the case dismissed."

131. *State ex rel. Priest v. Calhoun* (1920) (Mo. App.) 226 S. W. 329. See also *State ex rel. Calhoun v. Reynolds* (1921) (Mo.) 233 S. W. 483, where it was held upon certiorari that the judgment of the court of appeals would not be quashed. The entire opinion was devoted to a discussion of the question whether the petition for the receivership stated a cause of action. It was held it did not. There was no discussion of the propriety of prohibition where the petition does not state a cause of action and is not amendable. To the same effect is *State ex rel. Mills v. Calhoun* (1921) (Mo. App.) 234 S. W. 855. Daues, J., writing the opinion, said: "The best we can make out of the petition is the charge that the defendants, individually and for the corporation entered into certain contracts with the plaintiffs which, it is said, were broken. The allegations of the petition as to mismanagment, viewing the petition in the most favorable light for the plaintiffs, is no more than a charge of dissatisfaction and would not justify the appointment of a receiver. The decree rendered by the court is extremely latitudinous. Among other things, the court declared that the plaintiffs were entitled to the status of stockholders, which is outside of the relief prayed for in the petition, and which finding really precludes the appointment of a receiver in this case. The court, as said above, found that defendants were all of the stockholders in the corporation at the time the contract was alleged to have been

Prohibition was denied by the Supreme Court where the writ was asked immediately after a circuit court had issued an order to show cause why a receiver should not be appointed, and before the date on which cause was to be shown, and no demurrer had been filed to the petition.[132] So, also, the writ was denied where, in an equity suit involving title to land, a circuit court had appointed a receiver to hold and manage the land pending an appeal.[133]

(m) *Election Contests.*

Though an election contest is not a "suit" or a "case" within the usual meaning of those terms, it has been held to be a judicial matter, summary in its nature, and authorized by the constitution to determine title to office.[134]

Under the statute the contest is begun by a formal "notice" which serves the purpose of bringing the contestee into court and advising him of the grounds of the contest. Prohibition has been issued to stop a

made; but the court does not find that the corporation was insolvent, nor that the corporation was threatened by a mechanic's lien (which is alleged), or other loss of its holdings. If the finding of the court be correct that the corporation was without treasury stock, and that the defendants owned all of the stock, then the corporation never was in a position to carry out the terms of said alleged agreement. All of this appears from the face of the petition itself."

132. *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713. Faris, J., writing the opinion said: "This order to show cause on August 20, 1913, why a receiver should not be appointed, was made on August 18, 1913; notice of said order was in the meantime sought to be given to relators (or to some of them), but on August 19, 1913, the day between these dates, before the day of showing cause came around and before the court was ever advised as to whether the notice to show cause was served upon relators or any of them, the writ herein was sued out. Manifestly, we cannot forecast what action would have been taken by the learned court, *nisi*. We must presume that he knew the law and that he would follow it. He was not given the chance here to demonstrate the one fact or to perform the other. He had the authority in a proper case to appoint a receiver in vacation (Sec. 2018 R. S. 1909), and in cases of crying need to so appoint without notice (Tuttle v. Blow, 176 Mo. l. c. 171); certainly he can so appoint for such a period as will suffice for the appearance of the adverse party and the making of a showing of cause against the continuation of such receivership. (State ex rel. v. Wear, 135 Mo. 230.)"

133. *State ex rel. Elam v. Henson* (1919) (Mo.) 217 S. W. 17. See also *State ex rel. Allen v. Guthrie* (1912) 245 Mo. 144, 149 S. W. 305.

134. *State ex rel. Wells v. Hough* (1906) 193 Mo. 615, 91 S. W. 905.

circuit court from proceeding further when the notice states no facts, warranting a trial, and is unamendable;[135] or, has not been given the length of time required by law.[136] On the other hand, if the notice is given the length of time required by law and facts are stated, or are defectively stated but amendable, which if proven would give the office to the contestant, prohibition will not issue to correct mere error in the trial of the matter.[137]

(n) *Other Extraordinary Writs.*

There also is a decided tendency towards the view that if an inferior court is about to issue an extraordinary writ, improperly, that a superior court will prevent it from being done by its extraordinary writ of prohibition. The view seems to be that if the facts in the petition or application show affirmatively that no cause exists for issuance of the extraordinary writ, then the inferior court has no jurisdiction over that class of cases. About the same view prevails that has been referred to in the equity cases previously discussed. The Supreme Court, for instance, issued prohibition to a court of appeals stopping the latter court from proceeding further with a writ of prohibition issued to a probate court to stop further action by the probate court in a proceeding to adjudge one incompetent to manage his affairs.[137a] It was held the only question involved in the insanity proceeding was whether the person alleged to be insane lived in St. Louis or St. Louis County and that this was a question of fact exclusively for the probate court. So the writ was issued by the Supreme Court to a circuit court preventing the latter court from pro-

135. *State ex rel. Funkhouser v. Spencer* (1901) 166 Mo. 271, 65 S. W. 981.

136. *State ex rel. Hancock v. Spencer* (1901) 166 Mo. 279, 65 S. W. 984. But see *State ex rel. Brown v. Klein* (1893) 116 Mo. 259, 22 S. W. 693.

137. *State ex rel. Sale v. McElhinney* (1906) 199 Mo. 67, 97 S. W. 159; *State ex rel. Wells v. Hough* (1900) 193 Mo. 615, 91 S. W. 905.

137a. *State ex rel. Johnston v. Caulfield* (1912) 245 Mo. 676, 150 S. W. 1047. Graves, J., writing the opinion, said: "The information on file in Judge Shackelford's court charged that the alleged insane person was within the jurisdiction of his court. Whether he was in such jurisdiction was a question of fact to be determined by the probate court upon a proper hearing. Prohibition will not lie to stop the judge of probate from determining the question of fact as to his jurisdiction. By their writ respondents are seeking to do this, and in so doing are exceeding their authority and powers."

ceeding further with a petition for prohibition that was pending in the circuit court to stop members of a city council, city attorney, etc., from trying a city marshall on charges that had been preferred against him by the mayor.[137b] It was held the circuit court had no jurisdiction as the petition for prohibition on which it was about to act showed that prohibition was asked to stop mere administrative action, and not usurpation of judicial power. The writ was issued stopping a circuit court from proceeding in mandamus to compel a circuit attorney to institute a quo warranto action against one who claimed he was duly elected a member of a city legislative body.[137c] It was held the circuit attorney had the power of exercising his discretion whether he would institute quo warranto and that mandamus would not issue to control the discretion of an officer. A writ of prohibition was issued stopping a circuit court from further entertaining jurisdiction of a preliminary writ of prohibition the circuit court had issued to excise commissioners who had issued an order to a dramshop keeper to show cause why his dramshop license should not be revoked.[137d] The hearing as to whether the dram shop

137b. *State ex rel. McEutee v. Bright* (1909) 224 Mo. 514, 123 S. W. 1057. Graves, J., writing the opinion, said: "Nor will it do to say that because the respondent Bright is the judge of a court of general jurisdiction and such court can issue writs of that kind, that therefore this court cannot prohibit him for further proceeding in this case. A writ of prohibition from this court is proper, not only in cases where the lower tribunal has no legal authority to act at all, but also in cases wherein such inferior tribunal, although having general jurisdiction over a particular class of cases, has exceeded such jurisdiction in the particular case."

It would seem from this extract that the court regarded this as an instance of an excess of jurisdiction rather than a case of no jurisdiction. As it was held the circuit court could not issue the writ, it would seem as if this is a case of no jurisdiction and not a case where the circuit court had merely exceeded its power in this particular case.

137c. *State ex rel. Folk v. Talty* (1902) 166 Mo. 529, 66 S. W. 361. Burgess, J., writing the opinion, said: "There is nothing, however, disclosed by the record in this case, which justified the issuance of the writ of mandamus against the circuit attorney by the defendant, Talty, upon that or any other ground.

"Our conclusion is that it was not within the power or jurisdiction of Judge Talty as judge of the circuit court of the City of St. Louis to compel Circuit Attorney Folk, to exhibit a writ in the nature of a *quo warranto* at the relation of defendant Buechner against Buckley to require him to show by what authority he claimed to hold the office of a member of the House of Delegates of the City of St. Louis."

137d. *Higgins v. Talty* (1900) 157 Mo. 280, 57 S. W. 724. Burgess, J., writing

license should be revoked was not a judicial matter. A circuit court was also stopped by the Supreme Court from going further with a mandamus case to compel a county court to approve a sale of land to pay a decedent's debts,[137e] it being held that the kind of order to be made was for the county court to first decide. The opinion in this case was written by Currier, J., and is based upon the proposition that the circuit court had no jurisdiction of the alleged cause of action stated in the petition for mandamus. In the same year and at the same term of the Supreme Court another case was decided which seems to be *contra*.[137f] No mention is made in either opinion of the decision of the other case. In the case last referred to, the Supreme Court denied a petition for the writ on the ground that the circuit court though it had improperly issued mandamus to a county court, had only committed an error in the exercise of its jurisdiction. It seems that a circuit court issued a preliminary writ

the opinion said: "Our conclusion is that the circuit court of the City of St. Louis had no jurisdiction whatever over the case, and that the writ of prohibition should be awarded as prayed. The costs of this proceeding are adjudged against the defendant Joseph Roselli."

The view of the court in this case evidently was that there was no jurisdiction in the circuit court and not an instance of excess of jurisdiction.

137e. *Trainer et al. v. Porter* (1870) 45 Mo. 336. Currier, J., said: "It is urged, however, that the circuit court acquired jurisdiction of the subject-matter of the mandamus suit pending before it, and that this court ought not, therefore, to inquire into the manner in which that jurisdiction is being exercised. This proposition contains an erroneous assumption. The court, by its process, acquired jurisdiction of the party, but not of the cause of action, towit: the action of the court in disapproving the administrator's sale. That was the *gravamen* of the complaint and the circuit court, as we have seen, had no jurisdiction of it whatever."

137f. *Wilson v. Berkstresser* (1870) 45 Mo. 283. Bliss, J., writing the opinion, but not mentioning *Trainer v. Porter* (1870) 45 Mo. 336, *supra*, said: "If it had such jurisdiction, it does not matter, so far as this case is concerned, whether it has been lawfully or erroneously exercised. The county court has the sole right of saying whether a road shall be opened, changed, or vacated, and the circuit court cannot control its discretion in the matter. If a new road is to be opened, it has also the right of saying whether the damages, if any, shall be paid by the petitioners or by the county. If the court decides that the petitioners shall pay them, it ought not to order the road to be opened until the money is deposited. If it determine that the county shall pay them, the appropriation should be made before the road is opened. The county has clearly no right to open the road until one or the other is done. But, in either case, if the money is deposited by the petitioners, or if

of mandamus to a county court ordering it to allow B the sum of eighty-five dollars damages for changing a road and to draw a warrant for the same. It was said by the Supreme Court that issuance by the circuit court of the preliminary writ of mandamus was error as the award of the damages was not made upon a proper petition to change the road and also the damages were improperly assessed at a term subsequent to the term at which they should have been assessed. Bliss, J., writing the opinion, said l. c. page 851: "But no such continuance was had, and the eighty-five dollars verdict is *coram non judice* "

the court decides that the county shall pay the damages assessed, it becomes its clear ministerial duty to issue a warrant upon the treasury for the amount; and if the court refuses to issue such warrant, it should be compelled to do so by mandamus. It follows, then, that circuit courts have jursidiction by mandamus, in the matter of payment of damages assessed to the person through whose land a road passes, and, in a proper case, may lawfully issue the writ. Such jurisdiction being conceded, it clearly follows that a writ of prohibition will not issue to prevent its erroneous exercise. Some other remedy must be resorted to."

(To Be Continued)